

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Case No. 2006-1665-FH

JOHN HENRY CAVANAUGH,

Defendant.

OPINION AND ORDER

Defendant moves to quash counts I and II.

I

Defendant is charged with delivery and manufacture of marijuana, contrary to MCL 333.7401(2)(d)(iii) (count I) and maintaining a drug house, contrary to MCL 333.7405(1)(d) and MCL 333.7405(d). A preliminary examination was held in the 42-2 District Court, before the Hon. Paul A. Cassidy, on April 17, 2006. Two witnesses testified for the People, Officer Clinton Richard Bowerson and Officer Paul Kasperski of the Chesterfield Township Police Department. Defendant called two witnesses. Officer Bowerson testified that on December 24, 2005, he and Officer Kasperski performed a welfare check on children at an address in Chesterfield Township, and defendant answered the door and let them in. Bowerson testified that as Kasperski searched the home for the welfare check, defendant told Bowerson that he was "in trouble," because there was marijuana in the bedroom. Officer Kasperski testified that it is standard procedure in a welfare check case to go from room to room of a home to inspect. Kasperski testified that he heard defendant tell Bowerson that he had marijuana in his bedroom. Kasperski further testified that he observed some packaging materials on the bedroom dresser, then he proceeded to the



walk-in closet where he found a tray with marijuana inside. Kasperski testified that he had already suspected narcotics, as that is what the confidential informant told him he would find. The district court bound over on both charges. Defendant now moves to quash the information.

## II

Defendant argues, first, that the People failed to introduce sufficient evidence that the police officers had probable cause to enter the home of defendant without a warrant. Further, defendant avers, the testimony was inconsistent and did not establish who gave permission to enter and search the home. Defendant further argues that the People failed to introduce sufficient evidence that Officer Kasperski corroborated the anonymous tip he received, and therefore, the police acted upon information from an unreliable informant.

Defendant next contends that the search of the home was pretextual, as the officers could ascertain within thirty seconds of looking in the door that the welfare of the children was not in jeopardy. Defendant concludes that because there was no probable cause to enter the home and search it for narcotics, there was an illegal search, an illegal seizure of marijuana, and therefore count I for delivery/manufacture of marijuana must be dismissed. Second, defendant contends the count for maintaining a drug house should be dismissed, because, again, the People failed to introduce sufficient evidence that the police officers had probable cause to enter the home of defendant without a search warrant. Further, defendant contends the amount seized was too insufficient to establish that defendant is maintaining a drug house.

The People respond, first, that the investigation was initially based on the anonymous phone call that defendant's children's welfare was at stake. The People contend that while defendant now argues he did not give permission for the police to enter the home, the officers testified at the preliminary examination that he did give permission. Therefore, the People aver,

because there was no contradictory evidence presented at the preliminary examination (and only sworn testimony at a preliminary examination can be used for a motion to quash), this contention of defendant's is meaningless for this motion. Second, the People contend, when defendant himself blurted out that he had marijuana in the bedroom, this gave probable cause to enter the bedroom and find the drugs. Lastly, the People advise that a case defendant relies upon, *People v Keller*, \_\_\_ Mich App \_\_\_ ; \_\_\_ NW2d \_\_\_ (2006) is inapplicable, as it deals with the police misleading a magistrate in order to secure a search warrant.

### III

A defendant must be bound over for trial if evidence is presented at the preliminary examination that a felony has been committed and there is probable cause to believe that the defendant was the perpetrator. MCL 766.13; MCR 6.110(E); *People v Coddington*, 188 Mich App 584, 591; 470 NW2d 478 (1991). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to justify binding over a defendant. *People v Drayton*, 168 Mich App 174, 176; 423 NW2d 606 (1988).

Probable cause to believe that the defendant committed the crime is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged. *People v Vasher*, 167 Mich App 452, 456; 423 NW2d 40 (1988). This Court will not substitute its judgment for that of the examining magistrate unless an abuse of discretion is apparent. *Coddington, supra*. The standard for reviewing a decision for abuse of discretion is narrow. Generally, an abuse of discretion is found where an unprejudiced person, considering the facts upon which the decisionmaker acted, would say there is no justification or excuse for the ruling. *Killibrew v Dept of Corrections*, 237 Mich App 650, 652; 604 NW2d 696 (1999).

The Court notes, as did the People, that defendant does not challenge the district court's finding evidence to support each element of the felony counts; instead, defendant contends the police did not have probable cause to enter the house, and there was an illegal search and seizure once inside the house. The Court does not agree. Police may approach a person at his residence and ask for consent to search the premises in the absence of coercive factors. *People v Frohriep*, 247 Mich App 692, 698; 637 NW2d 562 (2001). The consent exception to the warrant requirement allows search and seizure when consent is unequivocal and specific, and freely and intelligently given. *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). The validity of consent depends on the totality of the circumstances, although consent can be valid even if a person is not apprised of his right to refuse consent. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999).

The Court is persuaded that the testimony presented at the preliminary examination established that defendant did in fact give permission to enter the home. Officer Bowerson testified that Officer Kasperski and he walked up to the house. Officer Kasperski knocked on the door and initially spoke to a child. (Tr 4) Bowerson explained that the steps to the trailer were small and both could not stand on them at the same time, so Bowerson did not see who was at the door. (Tr 4) Bowerson stated that "someone met him [Kasperski] at the door, and shortly later on Mr. Cavanaugh came up to the door and opened the door for us." (Tr 4) Once inside, Bowerson testified, the officers tried to calm down the children and tell them that they were just there to check on their safety and welfare. (Tr 5) Bowerson testified that the living conditions were not good, and there was trash all over the floors. (Tr 6) Bowerson stated Kasperski asked if they had clothing, bedding, running water, working toilets, etc., because the trailer did not look

like it was in great shape. (Tr 6) Bowerson stated, "He asked if he'd mind if he started checking the trailer, that's what I heard." (Tr 6)

Of import here, Officer Kasperski testified that after the son initially answered the door, Kasperski asked to speak to his father. (Tr 18) Kasperski stated that defendant came to the door, and Kasperski "explained him [sic] the situation and he allowed us to check the residence." (Tr 18) Officer Kasperski affirmed that there is a "standard procedure" in child welfare checks that "entail[s] going from room to room in the home." (Tr 19) After he headed for the master bedroom, Kasperski testified, he heard defendant state that he was in trouble, as there was marijuana in the room.

Thus, the only testimony presented was that defendant permitted the team to enter his home and, when asked, gave consent for a search. No evidence demonstrated that the team insisted it be allowed to enter or search the home. The fact that defendant was not told that he could refuse consent to search does not mandate a conclusion that consent was not freely given. Under the totality of the circumstances, the Court is persuaded that the evidence indicated defendant's consent was unequivocal and freely given. Therefore, there is no "search and seizure" violation.

#### IV

Based on the foregoing, it is hereby

ORDERED defendant's motion to quash the felony counts is DENIED. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last pending claim or close this case.

SO ORDERED.

DATED:

**PETER J. MACERONI**  
CIRCUIT JUDGE

AUG 16 2006

Peter J. Maceroni, Circuit Judge  
**A TRUE COPY**  
CARMELLA SABAUGH, COUNTY CLERK  
BY: *[Signature]* Court Clerk

cc: James Biernat  
Ronald Calhoun